No. 22342

In the

United States Court of Appeals

For the Ninth Circuit

FARMERS INSURANCE EXCHANGE,
Appellant,

vs.

JOE ROSE, JR. and VERONICA ROSE, his wife,
Appellees.

Appeal from the United States District Court
for the District of Arizona

Appellees' Response to Petition for Rehearing

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TABLE OF AUTHORITIES CITED

No. 23548

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The Petition for Rehearing contains nothing which was not presented in the original brief and argued to the Court. The opinion of this Court issued May 7, 1969, in this matter, correctly disposed of Appellant's contention by pointing out that this policy was not a "certified" policy. The policy provision relied upon simply isn't applicable here. Appellant is asking this Court to decide how it would

hold *if* the insurance company *had* certified the policy as proof of financial responsibility for the future. It should be a complete answer to point out that that is neither the fact nor the issue here.

The language of the policy provision Appellant relies on is a part of the contract between the insurer and the insured, whereby, if the policy is "certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law" and if the insurer is required to pay what it would otherwise not be required to pay under the policy, then the insured agrees to reimburse the company.

Appellant has quoted only a portion of the said paragraph in its Petition for Rehearing. The balance of the paragraph reads as follows:

> "The insured agrees to reimburse the Company for any payment made by the Company which it would not have been obliged to make under the terms of this policy except for this agreement."

Clearly, if the policy is not "certified as proof of financial responsibility for the future" under the Arizona law, then the provision referred to is not applicable as between the insurer and the insured and even less so as to the innocent accident victim injured by the insured.

This provision of the policy does not limit the liability of the company to the injured third party, however, even when the policy is a "certified" one.

To be acceptable under any financial responsibility law, a "certified" policy must provide coverage at least of the required statutory minimum. The clause in the paragraph which says "but in no event in excess of the limits of liability stated in the policy" has no meaning except that the company may be required to pay more than the statutory minimum even on a "certified" policy.

Appellant argues that the Arizona Supreme Court has abolished all distinctions between policies which are certified and those which are not. Appellant is saying that there is no longer such a thing as a certified policy under Arizona law, and that therefore it doesn't matter that the policy wasn't "certified". Appellant is asking the Court to rewrite this paragraph of the insurance contract to say, in effect:

> "When the provisions of the omnibus clause of a state's motor vehicle financial responsibility law obligate the company to pay upon the said policy, the company shall be liable only to the extent of the coverage required by law and the insured shall reimburse the company for any payment so made by it."

There is a vast difference between this and what the provision now says and means.

For the Court to so rewrite the policy would be contrary to the usual rules which provide that insurance policies are to be construed most strongly against the insurer and that the Court will not expand the language of the contract beyond its plain and ordinary meaning or add thereto. *New York Life Ins. Co. v. Hunter,* 138 P.2d 414; *Peterson v. Hudson Ins. Co.,* 15 P.2d 249; and *Dairyland Mutual Ins. Co. v. Andersen,* 433 P.2d 963.

To do as Appellant requests would, of course, do terrible violence to the present language and intent of such provision, as well as to the public policy as announced by the Arizona Supreme Court.

Appellant's contention that the distinctions of a "certified" policy still have specific purpose and function in Arizona then the policy provision referring thereto must still have some contractual meaning and the Appellant can't be heard to say that when the contract refers to a "certified" policy it doesn't mean it.

The insured who has a policy containing such a provision might reasonably be expected to understand that if:

1. He requests the insurance company to certify the policy as proof of financial responsibility for the future under the Arizona law, and
2. The insurance company does so certify it, and
3. He has an automobile accident causing injury to a third person, and
4. The company makes a payment on the policy which, except for their "agreement", it would not have been obliged to make, then
5. He is obligated to reimburse the company for such payments.

An insured with such a policy provision could hardly be expected to understand from it that:

1. Even though the policy was not certified as proof of future financial responsibility, then,
2. If he has an accident causing an injury to a third person,
3. The insurance company may reduce the coverage on his $50,000.00 policy to $10,000.00, and
4. Seek reimbursement from him.

Yet, this is what Appellant is contending should happen under this policy provision.

There are certain statutory conditions where a person must give proof of financial responsibility for the future in Arizona if he desires to retain his driver's license and/or the registration license for his vehicle. This proof is required, for example, under Arizona Revised Statutes, Sections 28-1161, 1162, 1163 and 1166, where a driver's license is suspended following conviction of a serious traffic offense or because the driver has failed to pay a judgment arising as a result of an automobile accident.

Arizona Revised Statutes, Section 28-1167, provides that proof of such financial responsibility may be given by filing a certificate of insurance as provided in Arizona Revised Statutes, Section 28-1168 or in Section 28-1169, which applies to nonresidents.

Arizona Revised Statutes, Section 28-1168, provides:

> "Proof of financial responsibility may be furnished by filing with the superintendent the written certificate of an insurance carrier duly authorized to do business in this state certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. The certificate shall give the effective date of the motor vehicle liability policy, which date shall be the same as the effective date of the certificate, and shall designate by explicit description or by appropriate reference all motor vehicles covered thereby, unless the policy is issued to a person who is not the owner of a motor vehicle.
>
> . . ."

It may be noted at this point that these "certified" policies are required only for drivers who have, for some reason, placed themselves in the category of poor or bad risks. It is difficult to imagine an insurance company writing a "certified" policy for more than the minimum required coverage where the insured's license is suspended.

It is also important to note that under Arizona Revised Statutes, Section 28-1171, the insurance company cannot cancel its certified policy until ten days after it has filed a notice of termination with the superintendent.

The case of *Dairyland Mutual Ins. Co. v. Andersen,* 433 P.2d 963, was decided by the Arizona Supreme Court several months after the case of *Sandoval v. Chenowith,* 428 P.2d 98. In the *Dairyland* case, the Arizona Supreme Court

made it clear that the special purposes and characteristics of "certified" policies are still very much in force and effect.

In that case the insurance company relied upon a policy provision almost, if not exactly, identical to the one Appellant relies on here. In the *Dairyland* case, the insurance company said, in effect, "Under the policy provision the insured must reimburse us if we are required to pay; therefore, we are not liable to the insured and therefore not liable to the accident victim injured by the insured".

The Court said at Page 966:

> ". . . We reject such a tenuous argument as obviously contrary to the public policy of this state. The purpose of certification as proof of financial responsibility for the future, under A.R.S. § 28-1168 of the Arizona Safety Responsibility Act, is to supply financial responsibility against which a person damaged or injured by the insured's act may have recourse. To hold with Great Basin would be to completely destroy the purpose of certifying proof of financial responsibility."

The Court then proceeded to order that if the trial court determined that the policy was "certified as proof of financial responsibility" then it was to enter an appropriate judgment in favor of the insurer and against the insured, based on said policy provision.

Allstate Insurance Company v. Dorr, No. 22443, was decided by this Court on May 2, 1969, just five days before the opinion was issued in this case. The opinion, written by Judge Madden, dealt with the Arizona motor vehicle financial responsibility law. The Court opinion there, written by Judge Madden, briefly, but correctly, stated that the liability of the insurance company is not limited to the $10,000.00 minimum, but extends to the full extent of the policy limits. The Court, in its opinion, said:

". . . Mr. Dorr, as the father of his deceased son . . . obtained a judgment . . . for $20,000. . . . Mr. Dorr would have been able . . . to collect from Allstate *up to the limits of its policy* . . . his judgment against" the Defendants. (Emphasis Supplied.)

Appellant struggles mightily to find some "implication" in the *Sandoval* opinion which would support its contention. First the Appellant "presumes", Page 13 of its original brief, that the policy in the *Sandoval* case had no provision such as it relies upon. Then, in its Petition for Rehearing it purports to quote language of the Arizona Supreme Court in the *Sandoval* opinion, when, in fact, it is quoting the language of the California court in *Globe Indemnity Co. v. Universal Underwriters Ins. Co.,* 20 Cal. Rptr. 73, which is quoted, in part, in the Arizona decision.

The Arizona Supreme Court, in its language in the *Sandoval* case, did not imply anything such as Appellant suggests, but it expressly held the company liable to the full extent of the policy limits and made it clear that the result would be no different under a "certified" policy. In doing so, it reversed the lower court and reiterated the strong public policy of the State of Arizona to afford maximum protection to the innocent victims of traffic accidents.

Appellees respectfully urge that the Petititon for Rehearing be denied.

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